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POLICE OFFICER'S HANDBOOK

THE CRIMINAL LAW

PART XX

DUI...

PREVIOUS CHARGE PENDING
(Ex Parte: Sarvis...SC)

LAWFUL WIRETAP
(US v. Ransom, 515 F2d 885)

POLICE BEEPER PLACED
ON SUSPECT VEHICLE
(US v. Holmes, 521 F2d 859)

FLEMING'S NOTEBOOK...Chapter 120:
Opinion of South Carolina Supreme Court in DUI case, (State v. Sarvis) regarding delay in bringing case to trial, MIRANDA warnings relative to volunteering to take blood test for alcohol at the hospital.

Prepared under the direction of E. Fleming Mason Producer of Crime-to-Court ETV Law Enforcement Informational Programs, in cooperation with South Carolina Educational Television Network with funds provided through the South Carolina Criminal Justice Academy.

LAW ENFORCEMENT - ETV TRAINING PROGRAM

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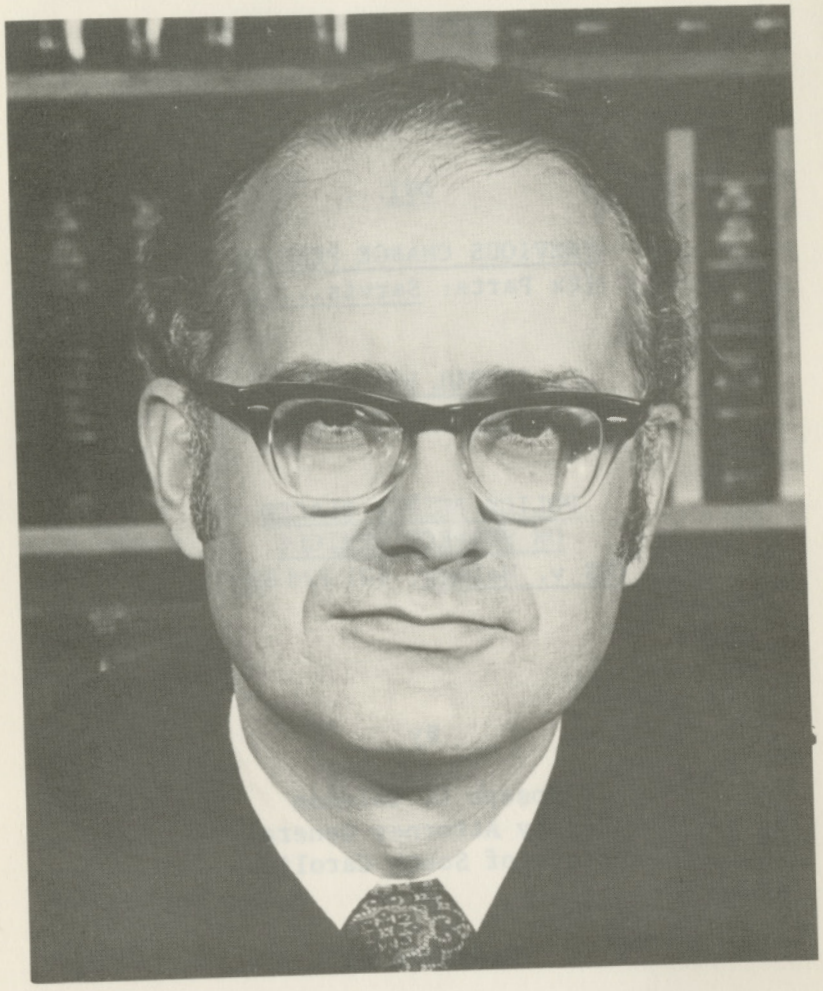

Hon. Robert H. Cureton
Judge of Oconee County
Civil - Criminal - Family Court

"Although police may examine the exterior of a vehicle parked in a public place, the attaching of a directional 'beeper' to the vehicle without a search warrant is unlawful... unless it is done in emergency circumstances and with probable cause."

Robert H. Cureton

Judge of Oconee County

Civil - Criminal - Family Court

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DUI...

PREVIOUS CHARGE PENDING

Many times a DUI defendant will be arrested and it will be found that there is a previous charge against him that has not been handled. The defendant has been summoned to appear before a magistrate or municipal court. Must the arresting officer proceed at the time and on the date set by the officer on the uniform traffic ticket?

EX PARTE SARVIS
(SC...Filed 12-30-75)

The South Carolina Supreme Court recently held that a reasonable delay in bringing a second DUI charge to trial so that disposition of a first charge could be determined was not prejudicial to the defendant.

The language of the Court follows:

DELAY IN TRYING SECOND CHARGE

"The only request by respondent was that his case be tried in Magistrate's court. He has not sought a speedy trial in any other court. In view of respondent's prior conviction for a first offense, the Magistrate's Court had no jurisdiction to grant respondent's request. In substance, the contention of respondent is that he was entitled to have the second charge against him tried in Magistrate's Court as a first offense while the appeal from the first offense conviction was pending. If this had been done and respondent had been convicted on the second charge, he would have had two convictions for first offense charges of driving under the influence, since his first conviction was affirmed.

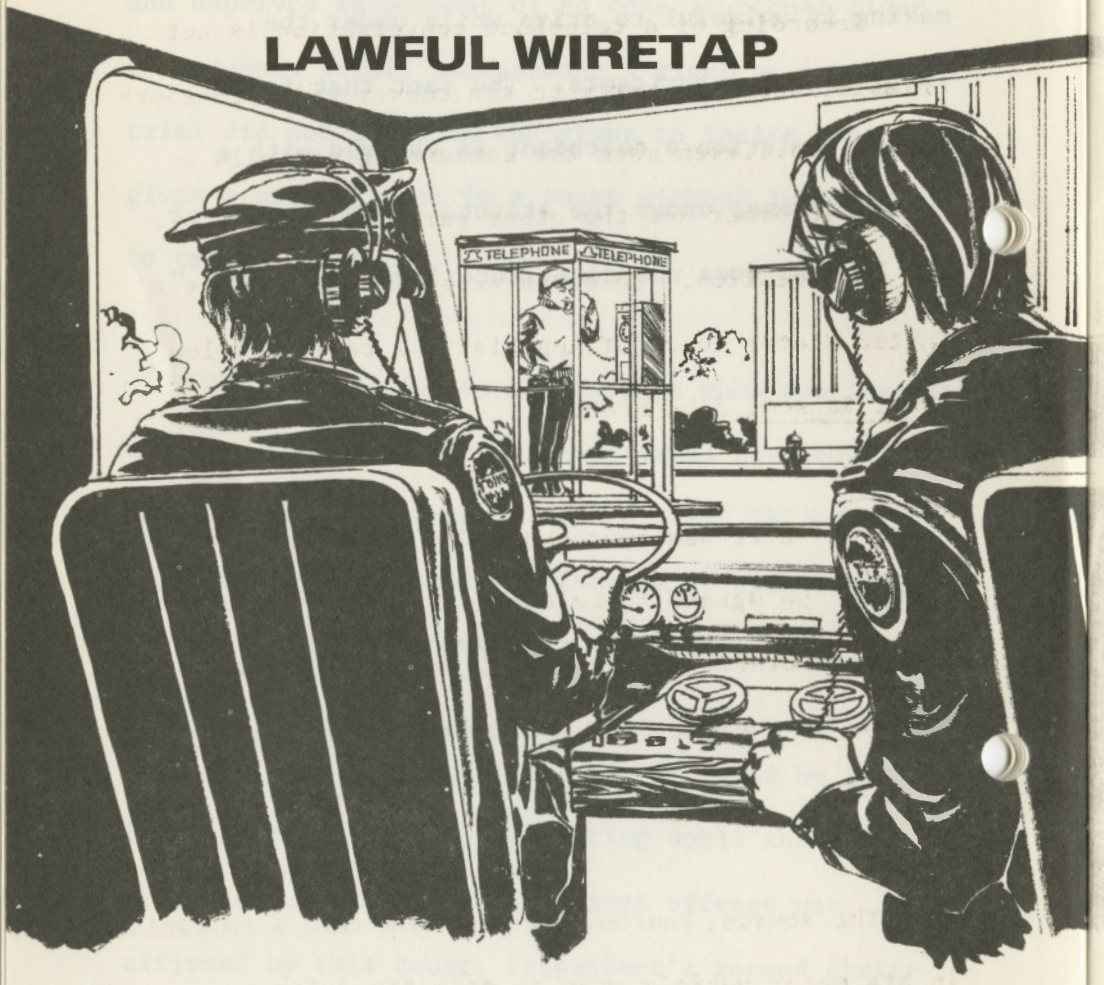
It is apparent that the main cause of delay in disposing of the second charge against respondent was the appeal from the conviction for the first offense. The delay, resulting from such appeal, in

order to determine the appropriate court in which to try the second charge, was reasonable and necessary and deprived respondent of no constitutional right to a speedy trial. Respondent's right to a speedy trial did not give him the right to insist that he be given a speedy trial in a court without jurisdiction to try the offense.

The controlling considerations when dealing with a defendant's right to a speedy trial have been set forth in State v. Foster, 260 S.C. 511, 197 S.E. (2d) 280. One of the important factors is that of prejudice to the defendant from the delay.

The only prejudice claimed, or found by the lower court, was that, by waiting until the appeal from the conviction for the first offense was affirmed by this Court, respondent's second charge was determined absolutely to be a second offense subjecting him to a charge of "a higher crime for which the punishment would be more severe". This

result is required by the law when a defendant is charged with multiple violations of the statute making it unlawful to drive while under the influence of intoxicants. The fact that for a second violation a defendant is charged with a second offense under the statute is the intent of the law and does not constitute legal prejudice."



LAWFUL WIRETAP

Recording of a telephone conversation is not unlawful when one party to the conversation consents to the tap...even when the consenting party is a police informer and the other party is unaware of the interception. This was recently restated by a United States Court of Appeals in a case entitled US v. Ransom, 515 F2d 885.

One Puett was apprehended by police on a drug charge. He agreed to telephone his 'source' and arrange another buy. The call was tapped and recorded by police with the knowledge and consent of Puett.

The source, Ransom, was arrested with a companion in his motor vehicle when he made the delivery. Amphetamines were delivered to Puett by Ransom, and, upon being told by Puett that the 'buy' had been made, police arrested Ransom and his passenger.

A pistol and a sawed-off shotgun were found under the front seat of the car. In addition to the drug charge, both were charged with unlawful possession of firearms. Officers took the car keys, unlocked the trunk and found heroin. The two were charged also with possession of heroin.

Upon conviction, the defendants appealed, giving several arguments why their conviction was unlawful. Conviction was upheld for the reasons stated by the Court.

ARGUMENT I

The defendants argued that the wiretap of the telephone conversation between Puett and Ransom setting up the 'buy' was unlawful. Court ruling:

"Ransom's argument that the interception was violative of federal wiretap law, namely Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq., is completely without merit. There was ample evidence to support the conclusion that Puett consented to the interception, and 18 U.S.C. §2511(2)(c) provides explicitly that it is not unlawful under the Act "for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." SEE ALSO Ansley v. Stynchcombe, 480 F2d 437 (5th Cir. 1973).

ARGUMENT II

It was argued for the passenger that he could not be convicted of possession of the pistol and sawed-off shotgun since the only proof was that they belonged to the driver Ransom. The Court said:

"Appellant DeMour claims that there was no evidence to connect him with receipt of the Browning automatic as charged in count three and the Smith & Wesson revolver as charged in count four. He submits that the government's evidence tended to show that co-defendant Ransom received the Browning pistol but argues that there was nothing to show that he also received the pistol. Likewise, he claims there was nothing to connect him with the Smith & Wesson Revolver. 18 U.S.C. App. §1202(a)(1) makes it unlawful for a convicted felon to receive, possess, or transport in commerce any firearm. There is ample evidence to support the conclusion that DeMour had, at least constructive possession of the pistols."

ARGUMENT III

Both defendants argued that police made an unlawful arrest because they did not actually see the amphetamines passed, but relied on Puett's word as to what had happened. If the arrest was unlawful, the search of the car would have been unlawful. Refusing to accept this argument, the Court said:

"Appellants Ransom and DeMour moved to suppress evidence obtained from the arrest and search and seizure. They argued that there was not sufficient probable cause to arrest without a warrant and claimed that the subsequent search and seizure was unlawful. The district court, finding sufficient probable cause for the arrests, denied the motion to suppress and appellants contend on appeal that this was error. Considering Puett's arrest barely two hours earlier and his statements implicating Ransom, the monitoring of the calls between Ransom and Puett, and the appearance of Ransom and DeMour shortly afterwards at

the trailer court parking lot, we think that there were ample grounds to believe Ransom and DeMour had been and were at that time committing violations of the Georgia narcotics law. Moreover, at the time of the arrest, Ransom and DeMour were leaving the scene. It would have been totally unreasonable to require the police officers to have obtained an arrest warrant in view of these circumstances. There was probable cause to arrest, and the search and seizure incident thereto did not violate the Fourth Amendment."

POLICE BEEPER ON SUSPECT VEHICLE

POLICE BEEPER

ON SUSPECT VEHICLE
(US v. Holmes, 521 F2d 859)

It had not been decided by a Federal Court until recently, whether or not the placing of a directional 'beeper' on a suspect vehicle by police constituted a 'search' within the meaning of the constitutional guarantee against unreasonable searches and seizures.

The Federal Court of Appeals for the 5th Circuit (New Orleans) has now held that such police activity does constitute a 'search' and that police need a search warrant or probable cause in emergency circumstances in order to make it lawful.

FACTS

An undercover agent met a pusher in a lounge in Gainesville, Florida, to complete arrangements for a 'buy' of marijuana. While the two were inside the lounge, where the agent showed the $45,500 cash

needed for the purchase, other police officers attached a directional 'beeper' to the underside of the pusher's car, which was parked outside. Their purpose was to be able to ascertain the location of the suspect vehicle in the event visual surveillance failed. They had no search warrant, and there had been sufficient time in which to obtain one.

The suspect vehicle was lost to visual surveillance, and directional finders located it with the aid of the 'beeper' within a hundred yards of a rural residence near which was a wooden shed.

When the officers arrived at the scene, the suspect vehicle had gone. They looked into the shed through a large hole and saw marijuana. They then put out an APB to stop the suspect vehicle and search it for drugs.

The suspect vehicle was spotted by other officers on the highway, stopped, and searched. Twelve

hundred pounds of marijuana was found. The vehicle's two occupants were charged with possession with intent. Others at the residence were charged with possession with intent arising out of the marijuana found in the shed.

Upon appeal from conviction, the defendant's questioned the right of the officers to attach a 'beeper' to the suspect vehicle without a warrant and to go upon private property (within the curtilage) and look into the shed where marijuana was found. Court rulings on these questions:

INSTALLATION OF BEEPER

"(1) We hold that the installation of an electronic tracking device on a motor vehicle is a search within the meaning of the Fourth Amendment. Although the government does not dispute that its agents were seeking to unearth evidence of crime and the identity of associates in crime for criminal prosecution, it argues that the installation was not a search because no privacy was invaded. In relies upon the Supreme Court decision in Katz v. United States, 1967, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576. Its premise is twofold: (1) that although a technical trespass was committed, a citizen can have no reasonable expectation of privacy in a vehicle left on a public parking lot with its exterior and much of its interior accessible to any passerby; and (2) that a citizen cannot reasonably expect his movements on public roads to remain private.

Each premise in the government's analysis is defective. We likewise turn initially to KATZ, supra, for its explication of Fourth Amendment application. Justice Stewart there noted that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." (Footnote omitted.) 389 U.S. at 350, 88 S.Ct. at 510, 19 L.Ed.2d at 581. The location of the vehicle at the time of the installation is not controlling:

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed. 2d 312; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected. 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582.

When a person parks his car on a public way, he does not thereby give up all expectations of privacy in his vehicle. There is a right to be secure, even in public. Certainly, the driver may not complain if police observe objects in plain view of the car. See, e.g., Marshall v. United States, 5 Cir. 1970, 422 F.2d 185. Nor may he complain if they search out his VIN, see n.9, supra, take a paint scraping, or compare tire treads for identification comparisons. These intrusions are of limited scope, purpose and duration. It is equally certain, however, that he may complain if the police break into his car and seize objects hidden in the trunk or glove compartment, even if the car is parked in a public lot, without probable cause and the existence of exigent circumstances. Yet the government's first premise would encompass just such condemned police action.

Further, there is no way to protect against this type of intrusion once one leaves home and enters

the public streets. There is no way to lock a door or place the car under a protective cloak as a signal to the police that one considers the car private.

Conceding the right of the agents to be in the parking lot next to the van, they had no right to attach the beacon without consent or judicial authorization. We are unwilling to hold that Holmes, and every other citizen, runs the risk that the government will plant a bug in his car in order to track his movements, merely because he drives his car in areas accessible to the public. The presence or absence of a physical intrusion into the interior of the car does not affect this conclusion. See Katz, supra."

SEARCH OF THE SHED

"The district judge ordered suppression of the evidence seized from the Moody property on an alternative ground. He found, with ample evidentiary support, that the shed was within the curtilage and that agent Vipperman, in peering into its rear, trespassed on the curtilage. He ruled that this warrantless peering into the shed after trespassing was an unlawful search and seizure which did not fall within the "open fields" exception to the warrant requirement. See Hester v. United States, 1925, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. In other words, he determined that the marijuana lying in the shed was not in "plain view", and ordered all evidence seized from the Moody property suppressed as "fruit".

"Prior to entry upon the Moody land, the agents knew the general location of the van. It could have stopped on the Moody property, but it could as easily have stopped in the woods or near the church. For that matter, it could have stopped at any point

enroute from Gainesville to Federal Point to pick up the marijuana. No agent ever saw the van on the premises or saw signs of any activity, legal or illegal. At the time of entry, the agents also knew the van had been seized, so they could not have been looking for the van. Rather, they were looking solely for evidence of crime on little more than conjecture that the van had in fact stopped there to make its pickup. Agent Vipperman admitted that his sole purpose in getting close enough to peer into the hold in the shed was to look for marijuana.

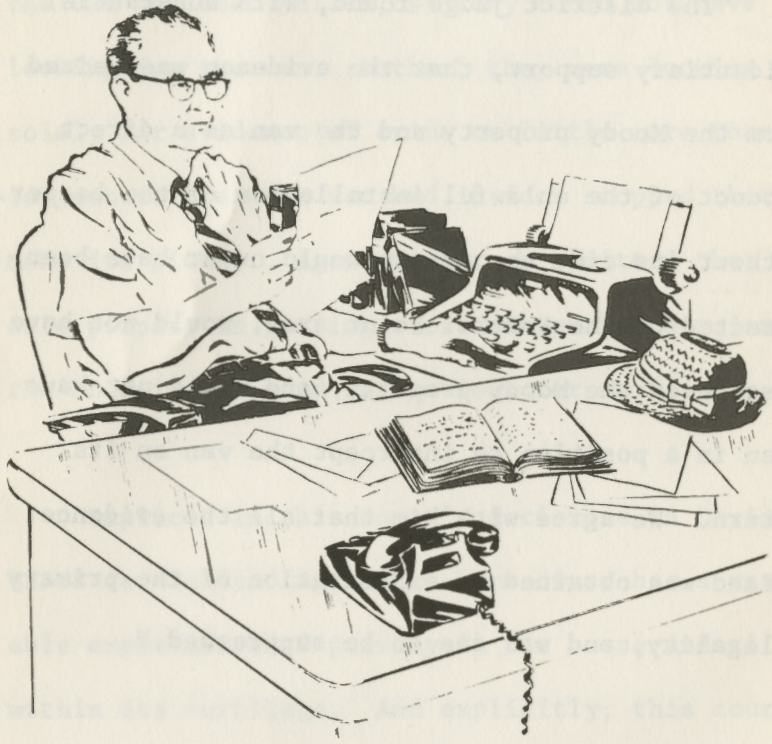
Implicit in this court's decisions in Davis and Brock is the finding that a home-owner has a reasonable expectation of privacy in his house and all within its curtilage. And explicitly, this court noted, in Davis, 423 F2d at 977, that "The high degree of judicial sanctity which the courts have accorded to dwellings is based upon the concept of privacy and the right to be left alone". See Brock, 223 F2d at 685, where the court stated that the police action there violated the homeowner's "right to be let alone."

Included also in the appeal was the 'fruit of the poison tree' question. On this point the Court said:

"The district judge found, with substantial evidentiary support, that the evidence was seized from the Moody property and the van as a direct product of the unlawful installation of the beeper. Without its aid, the agents would never have been directed to the Federal Point area, would not have discovered the Moody property, and would not have been in a position to intercept the van on its return. We agree with him that all the evidence seized was obtained by exploitation of the primary illegality, and was due to be suppressed."

Convictions of the defendants were reversed. All evidence was found by police as a result of an unlawful search (use of a 'beeper') and was inadmissable as 'fruit of the poison tree' (Wong Sun, 9 Led 2d 455). NOTE: The Holmes ruling does not prohibit visual surveillance by police officers.

FLEMING'S NOTEBOOK!



FLEMING'S NOTEBOOK, Chapter 120:

The South Carolina Supreme Court has held that a delay of 23 months in bringing a DUI case to trial did not entitle the defendant to a reversal, because the delay was not caused by negligence on the part of prosecuting officers, but was because of delay caused by the defendant's motions for continuance. State v. Sarvis, SC, Op. No.20066, filed July 17, 1975.

Sarvis also held that when a DUI suspect volunteers to take a blood test for alcohol at the hospital, the defendant is not entitled to either Miranda warnings or a warning that the blood test could be used against him in court.

With respect to the defendant's argument that he was not afforded a speedy trial, the Court said:

"No demand was ever made by the respondent (defendant) for a trial, and according to the (Magistrate's) return, the delay in bringing the case to trial resulted from the indulgence of respondent's (defendant's) then attorney, so that he could attend to legislative matters, and not to neglect on the part of the State.

"The continuance of the case in order to convenience respondent's (defendant's) counsel and the failure to demand a trial constituted a waiver of respondent's (defendant's) right to a speedy trial."

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